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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

Nos. 74-1107
74-1304

UNITED STATES OF AMERICA
Plaintiff and Appellee,

vs.

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT,
B. L. BARNETT, individuals, and
SPRING MEADOWS RANCH,
Defendants and Appellants,
and
STATE OF NEVADA, ex rel. ROLAND D. WESTERGARD,
State Engineer,
Intervenor and Appellant.

REPLY BRIEF FOR INTERVENOR-APPELLANT STATE OF NEVADA

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Subject Index

I.

Page

The United States Government should be required to establish the existence of an implied water right in accordance with state law 2

II.

The defense of res judicata should be applied to preclude this action by the United States 5

Table of Authorities Cited

Cases Pages

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 2

Federal Power Commission v. Oregon, 349 U.S. 435 (1955) 2, 4

Ickes v. Fox, 300 U.S. 82 2

Winters v. U. S., 207 U.S. 564 (1908) 3

Statutes

Act of July 26, 1866, Ch. 262, §9, 14 Stat. 253 (now Act of July 10, 1952, Ch. 651, §208(A-2), 66 Stat. 560, 43 U.S.C. §661 (1938)) 2

Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §321 (1958) 2

Nevada Revised Statutes, Chapter 533 8
- Section 533.030 7
- Section 533.090 ..... 7, 9
- Section 533.325 8
- Section 533.365 8

Nevada Revised Statutes, Chapter 534 8
- Section 534.020 7

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This reply brief is submitted to supplement the reply brief of petitioners, Cappaerts, by briefly responding to some of the arguments raised by the United States Government which were not specifically considered by the reply of petitioners, Cappaerts.

I.

THE UNITED STATES GOVERNMENT SHOULD BE REQUIRED TO ESTABLISH THE EXISTENCE OF AN IMPLIED WATER RIGHT IN ACCORDANCE WITH STATE LAW.

In its brief the Government first argues in substance that the Federal Government pursuant to the property clause of the United States Constitution has the power to withdraw public land and, therefore, it automatically acquires water rights on said reserved land. (U.S. Br., 20) This argument assumes that because the Federal Government has the right to reserve public land it also has the right to reserve water on the public land and upon adjacent nonpublic land. This position allows the Government to simply step right over the question of who shall determine the existence of an implied water right by saying that since the water right belongs to the United States Government and always has only the United States Government can make the determination as to its existence.

This position completely ignores the fact that Congress as interpreted by this Court specifically stated that water rights on public lands are separate from the property interest, and the existence thereof shall be determined separately under state law. *Act of July 26, 1866,* Ch. 262, §9; 14 Stat. 253 (now Act of July 10, 1952, Ch. 651, §208(A-2), 66 Stat. 560, 43 U.S.C. §661 (1938)); *Desert Land Act of 1877,* 19 Stat. 377, 43 U.S.C. §321 (1958); *Ickes v. Fox* 300 U.S. 82; *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935); *Federal Power Commission v. Oregon,* 349 U.S. 435, 448 (1955). The Federal Government cannot reserve something it did not own in the first place. Very possibly the Federal

Government might be entitled to a water right for use on the reserved land, but since it is an "implied" right, the existence of such a right must be determined by examining the circumstances surrounding the reservation of the land.

As discussed by Nevada in its opening brief the doctrine of impliedly reserved water rights as originally propounded in *Winters v. U. S.,* 207 U.S. 564 (1908) was not created based upon a right, but upon need dictated by the circumstances. (Nev. Br., 14-15) The Government brief supports this conclusion when it states that the test for determining the existence of a federal implied water right is the *need* for which a reservation of land is made. (U.S. Br., 20-21) The acceptance of the "need theory" as opposed to the "right theory" as the basis for the existence of an implied water right is then quite compatible with the early holdings of this Court that all water rights were severed from the land and are to be determined in accordance with state law.

The state pursuant to its existing procedures can determine in each instance whether the circumstances surrounding the federal reservation of land is such as to justify the creation of an implied water right in the United States Government. The state is quite capable of understanding and applying the implied water right theory when appropriate. Allowing the state to make that determination is not only consistent with the position that water rights on public land must be determined in accordance with state procedure, but it also provides for an experienced and knowledgeable forum for asserting and protecting the United States Government's need to use water for its reserved lands.

The Government does no have to necessarily obtain an appropriative right to have a water right as is suggested in its brief. (U.S. Br., 23-24) As set forth in petitioner's opening brief, the State Engineer by virtue of the "public interest" provisions of Nevada's water statutes can recognize the existence of such an implied right and refuse any other applications on such basis. (Nev. Br., 41)

However, the Government maintains that state procedures are not adequate for it, even if it is for all other users, because it should have the right to unilaterally reserve water for itself for unknown, speculative future uses regardless of whether the water could be presently utilized by other users. (U.S. Br., 24)

Nevada agrees with the Government that the various Federal Land Acts do not bar the application of the implied water right theory to nonnavigable waters. However, those same Federal Land Acts also require that the application of the implied right doctrine be done, at least initially, within the frame-work of the state law. To accept the Government's position would be to say that the state procedures are good enough for private citizens, but not good enough for the United States Government.

The conclusion of the State of Nevada that the decision in *Federal Power Commission v. Oregon* (*Pelton Dam*) was based upon an expressed intent rather than an implied intent of Congress and the application of the federal supremacy theory is perfectly compatible with the position of petitioner that the Federal Land Acts separated the land and water interests on public land. "Need" as expressed in the federal legislation involved in the *Pelton Dam* case simply took precedent over the need of the state to pre-

serve the fish. The Government apparently does not disagree with this conclusion as it made no reference one way or the other to petitioner's analysis of this particular case.

II.

THE DEFENSE OF RES JUDICATA SHOULD BE APPLIED TO PRECLUDE THIS ACTION BY THE UNITED STATES

In presenting its opposition to Nevada's argument on *res judicata* the Government attempts to paint the proceeding before the Nevada State Engineer as a friendly inquiry of no real significance. (U.S. Br., 41-49) Nothing could be further from the truth.

Petitioner, State of Nevada, has set forth in its opening brief in detail the extent the Government went to in the hearing to obtain an adverse ruling to the applicants for well water. (Nev. Br., 43-44) It is quite clear from a reading of the transcript that the Government protested the granting of the well permits to petitioners, Cappaerts, as vigorously as they were apparently able. As has already been cited, the Government's case included the presentation into the record of a detailed, lengthy and well-prepared statement discussing all aspects of Devil's Hole and the effect of the adjacent pumping (Appendix A, pp. i-iii), cross examination of both witnesses presented by the applicants and presentation of its own expert witness. Additionally, and very importantly, prior to the Engineer making a decision, President Truman's Proclamation of 1952, which the Government now claims as its basis for its implied water right, was introduced into evidence by the

Government. (Appendix A, p. iv) That the hearing officer considered the existence of a federal water right based upon the evidence submitted by the Government is clearly supported by the hearing officer's reference to the fact that he believed there were no water rights in Devil's Hole. (Appendix A, p. v) (U.S. Br., 4 note 43) The Government must have recognized that the issue of a federal water right in Devil's Hole was an issue, but failed to present sufficient evidence or argument to establish it and, thus, such a right was rejected.

To state as the Government has done (U.S. Br., 47) that the National Park Service did not litigate the question of its federal water right in Devil's Hole is to completely ignore what actually occurred at the hearing.

The basis for the existence of a federal water right may not have been presented as well as it could have been, but the Government counsel's failure to articulate the Government's claim for water rights in Devil's Hole does not alter the fact that the Government *had the opportunity,* even if not taken advantage of. Certainly, the same argument and facts now urged in the present case for establishment of an implied water right existed at the time of the administrative hearing and could have been urged to the same extent. Failure to properly do so does not allow the Government to now argue that it really did not mean to litigate the issue when in fact it did.

Petitioner, State of Nevada, is confident that if the State Engineer had rejected the application for the appropriation or postponed its decision the Government would not have ignored the decision and said, "Well, that wasn't really a proper hearing, so we better go to court." The

issue considered and determined in the administrative hearing was exactly the same issue that is before this Court; therefore, the defense of *res judicata* is applicable.

The Government further argues that Nevada cannot raise the issue of *res judicata* because it was not a party to the administrative proceedings before the Nevada State Engineer and, therefore, not in privity to the Cappaerts. (U.S. Br., 42-43) Nevada Revised Statutes 533.030 and 534.020 recite that all water, ground or surface, belongs to the public, and must be administered by the State Engineer. (Nev. Br., Appendix A, ii and v) This being the case it seems obvious that the State of Nevada is a real party in interest to any water hearing proceedings conducted by the State Engineer. If not a party in any other sense, at minimum it is the trustee of the water for the general public. There can be no determination of water rights without the State of Nevada being involved. Therefore, clearly Nevada is a party for purposes of *res judicata.*

The Government also makes some attempt to argue that there is a substantial difference between what it calls an adjudicatory procedure and a hearing on an application for appropriation. It argues that a hearing on an application for appropriation does not constitute a true adjudication of competing water rights so a decision in such a hearing is not in any way binding. (U.S. Br., 44-45) The only significant difference between the two methods of determining water rights is the way in which the question arises. Nevada Revised Statute 533.090 allows a water user to obtain a determination of relative water rights on a stream by filing a petition requesting such a determi-

nation. It is significant to note at this time that N.R.S. 533.090 cited by the Government for adjudication of water rights pertains only to stream water, and there is no comparable provision in N.R.S. 534 as concerns ground water. Provisions of N.R.S. 534 refer back to Chapter 533 of Nevada Revised Statutes pertaining only to the appropriation of water.

In any event N.R.S. 533.325, et seq., provides for the same result reached in an adjudicatory procedure by means of a hearing on an application for appropriation. Hearing procedures are very similar. Under the "appropriation method" of determining water rights what the Government argued is not a real determination of competing water rights. N.R.S. 533.365 provides in pertinent part, ". . . 3. The State Engineer shall duly consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a *full understanding of the rights involved . . .*". (Emphasis added) What would be the necessity of considering evidence on the "rights involved" if a decision on competing rights could not be made. Of course, a protestant must establish an existing right before it can be used as a basis for affecting the Engineer's decision on an application for appropriation. If a protestant can establish the existence of a water right and that the water right will be adversely affected by a new appropriation, the application would be denied or limited by the State Engineer. In fact, that is exactly the reasoning the Engineer followed in the present case in that he first determined that there was no federal right in Devil's Hole and then determined that it could not therefore be affected. (Appendix A, p. v)

It is the contention of Nevada that any differences are in procedure only, not in result. Either proceeding can become grounds for a *res judicata* defense.

Further, the Government's argument in this regard seems to conclude that if a party, such as the United States Government, wants to obtain an adjudication of its water rights it must file an application with the State Engineer requesting such a determination, and such a procedure could be *res judicata*. This position goes to the very crux of Nevada's argument. A determination of the existence of a water right, whether it be appropriative or implied, must be made initially by the State of Nevada. The Government seems to concede this in its argument on this point. Despite the Government's shotgun attempt to argue that the issue of the existence of a federal water right was not considered and decided in the administrative hearing, the fact of the matter is that it was and, therefore, precludes the present action.

Dated, Carson City, Nevada,
December 3, 1975.

Respectfully submitted,
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Special Deputy Attorneys General,
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(Appendix A Follows)

APPENDIX

Appendix A

PORTION OF ADMINISTRATIVE HEARING

[p. 18] The U. S. Department of the Interior recommends most strongly to the Nevada State Engineer that he reject outright the pending applications of Spring Meadows, Inc., and any other pending applications, or postpone any action thereon until the previously mentioned studies are completed and analyzed.

That concludes my statement. Thank you.

MR. WILSON: A point of inquiry, is this statement that was read, is it the Engineer's position that the factual statements presented in the body of this report are to be accepted as evidence on the part of the Protestant, or are they like any statement, if they are not evidence of the facts, they are not considered. For example, on page six and seven there are certain—and in other parts of the statement, there are in effect accounts of statements made by other parties of source, hydrological and geological conclusions with respect to the effect the granting of these applications would have on the subject Basin.

MR. AHO: It is my request that those statements are to be taken as evidence of the fact. You do have copies of Dr. Maxey's report and you also have, of course, your own information in your own office to which I referred, the well drilling logs, and you also are well aware that the United States Geological—the individual's name escapes me for the moment—is working closely with your office in a water study, [p. 19] and I think all of the information to date which I have alluded to in my report is available and in reports in your own office, if I am not mistaken.

MR. WILSON: This material is a matter of record, that is right; but my point being there should be an op-

portunity to question the material that is presented here, at least to explore it in detail; that is my feeling, at least as far as this hearing is concerned.

MR. WESTERGARD: Well, the statement, of course, that was presented will be included in the record and the reports that are mentioned will also be evaluated.

In other words, the reports mentioned in the statement will be a part of the record.

MR. AHO: If I may make a further statement, I would like to state for the record that these reports tend mostly to indicate the need for further studies. These reports indicate that the precise data is not available at the present time and that is why we are urging most strongly that you withhold action until the other reports are completed which will be of a highly technical and acceptable nature.

MR. WILSON: I had another inquiry and that is, also, to inquire, insofar as the Engineer's knowledge and records are concerned referred to in the statement appearing on page 10 which asserts that these large withdrawals may, in fact, exceed the annual recharge of the water in the Basin with its [p. 20] dire consequences to the entire underground water supply in the Basin. It is my general understanding that the actual withdrawal of water at the present time is within and does not exceed the annual recharge, if my understanding is correct.

MR. WESTERGARD: This material is not of record in this hearing, Mr. Wilson, but there is a certain amount of information on this report, the State Engineer's report, and that has been and will be considered.

MR. WILSON: Now, with respect to the factual situation regarding the use of water exceeding the annual recharge, should we have witnesses for that or do the words

"may, in fact, exceed the annual recharge—". The point of my inquiry is to ask, as a factual matter, whether or not the use of water at the present time, so far as your information is concerned, does in fact exceed the annual recharge or whether the use of water at this time is within the annual recharge. Mr. Aho's statements says "may," and I am simply raising that question.

MR. AHO: The reason this statement was made is for the purpose of future withdrawals, it is not whether the present withdrawal does in fact exceed or did ever exceed the annual recharge, but further applications may exceed that recharge and that is the primary purpose of the study that is being made at the present time.

MR. WILSON: Well, I am going to waive my opening

[p. 76] have no basis for that statement, and in that case, I suggest that we are not interfering with the government's water rights because the government's witness himself stated that the lowering of the water level at any point of diversion is not unreasonable.

Now, that was his precise statement and that is the statutory requirement with respect to the appropriation of water from an underground well.

Now, if the Engineer please, I am going to ask that the applications be granted, not in spite of a study, really, but one, because we need to have them granted and hopefully in granting these applications it will give the Interior Department a motivation to move and to set down with us and discuss the problems, and that way will realize that they cannot just sit by until it goes away or Spring Meadows picks up the full bill for it.

I ask that the applications be granted.

MR. AHO: May I reply briefly?

MR. WESTERGARD: Yes.

MR. AHO: He questions my statement that Devil's Hole was added to the Death Valley Monument in 1952, primarily to protect the pupfish. To counter that allegation I would like to offer a copy of President Harry S. Truman's Proclamation No. 2961 establishing Devil's Hole as a part of the Death Valley Monument and the State Engineer can draw his own

[p. 82] decision soon. You know what that decision has to be and for that reason I am going to overrule the request of the government through Mr. Aho for an extension of time in making a determination on this matter. In this vein I do feel that through the information we have available in our own records and through the expert testimony that was given here today and through the arguments, very frankly, there is no question in my mind what decision has to be made, and that again is my determination. And the reason for my determination is that further postponement of action is not in order.

There has been only brief reference, I believe it was by Mr. Wilson, he referred to an assertion of a federal water right. There is no record of a water right on Devil's Hole. I mention that because this is one of the criteria that the State Engineer must consider in making a decision, the possible effect on existing water rights. There are no water rights on Devil's Hole, so we will not pursue that any further. The statute, as has been pointed out several times this morning, provides than any appropriator must expect a reasonable lowering of the water table and I think the testimony, the expert testimony was to the fact that there has not been an unreasonable lowering of the water table. Evidence to the contrary has not been submitted by the government so the first criteria, then, effect on existing water rights, it is my ruling that the evidence before us in the case that